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No. 01-729

IN THE

Supreme Court of the United States

GLENN G. GODFREY AND BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JAMES W. KLEIN
SAMIA A. FAM *
CORINNE A. BECKWITH
ANDREA L. ROTH
PUBLIC DEFENDER SERVICE FOR
THE DISTRICT OF COLUMBIA
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE* [1]

The Public Defender Service for the District of Columbia ("PDS") represents clients who will be affected by this case because of the close similarities between the retroactive 1999 D.C. Sex Offender Registration Act ("DC-SORA"), D.C. Code § 22-4001 *et seq.* (2001) and the Alaska statute under review. PDS clients have constitutional challenges pending in both the federal and local appellate courts of the District of Columbia. *See Doe v. Williams*, 167 F. Supp. 2d 45 (D.D.C. 2001); *W.M., et al. v. CSOSA*, D.C. Ct. App. Nos. 01-SP-683, *et al.*

STATEMENT

The Alaska Sex Offender Registration Act ("ASORA") is an "offense-based" Megan's law that applies retroactively to virtually every offense of a sexual nature in the Alaska Criminal Code. Emblematic of categorical schemes emerging around the country, Alaska's registration and community notification sanction is imposed, for life or for fifteen years, *solely* because of the offense of conviction and may not be avoided for any reason, including overwhelming proof of an offender's current *non*-dangerousness. "Offense-based" laws must be distinguished from the more narrowly drawn "offender-based" laws, which calibrate community notification, if any, to the former offender's assessed risk of recidivism, and limit release of the registry to those at risk. Contrary to Alaska and its *amici*'s suggestion that the differences among Megan's laws are irrelevant to constitutional analysis, excessive laws that fail to assure

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[1] All parties have consented in writing to this brief's submission. PDS attorneys are the sole authors. No entity external to PDS contributed money toward the brief.

accurate individualized determinations of dangerousness have fared poorly in court,[2] while the more narrowly drawn statutes have withstood review.[3]

Alaska law: ASORA requires sex offenders to register and repeatedly re-register with police, with criminal penalties for failure to do so, and authorizes unlimited public dissemination of their personal information and degraded legal status of "registered sex offenders." "Aggravated" sex offenders must register *at least quarterly for life*, which in the discretion of authorities may consist of reporting in-person at police stations, for the purpose of answering personal questions under oath, photographing and fingerprinting. Alaska Stat. § 12.63.010 (d)(2) (sworn statements musts be

[2] Decisions invalidating or enjoining offense-based laws on *ex post facto* grounds include: *Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998); *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994); *Doe v. Attorney General*, 680 N.E.2d 97 (Mass. 1997); *State v. C.M.*, 746 So.2d 410 (Ala. Crim. App. 1999); *State v. Myers*, 923 P.2d 1024 (Kan. 1996). *But see Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2001). Decisions invalidating or enjoining Megan's laws on due process grounds include: *Doe v. Dep't of Pub. Safety*, 271 F.3d 38 (2d Cir. 2001), *cert. granted*, No. 01-1231 (May 20, 2002); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Fullmer v. Michigan Dep't of St. Police*, 2002 WL 1164148 (E.D. Mich.); *A.A. v. New Jersey*, 176 F. Supp. 2d 274 (D.N.J. 2001); *Williams*, 167 F. Supp. 2d 45; *Doe v. Lee*, 132 F. Supp. 2d 57 (D. Conn. 2001); *Doe v. Pryor*, 61 F. Supp. 2d 1224 (M.D. Ala. 1999); *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998); *Commonwealth v. Williams*, 733 A.2d 593 (Pa. 1999); *Doe v. Attorney General*, 715 N.E.2d 37 (Mass. 1999); *Doe v. Attorney General*, 686 N.E.2d 1007 (Mass. 1997); *In re C.M.*, 578 N.W.2d 391 (Minn. Ct. App. 1998); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995); *Hawai'i v. Bani*, 36 P.3d 1255 (Haw. 2001); *Noble v. Board of Parole*, 964 P.2d 990 (Ore. 1998); *People v. David W.*, 733 N.E.2d 206 (N.Y. 2000); *State v. Pierce*, 794 A.2d 1123 (Conn. App. 2002).

[3] *See, e.g., Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997); *Verniero*, 119 F.3d 1077; *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997).

submitted "in the manner required by the department").[4] Other "sex offenders" must register annually for fifteen years following their unconditional discharge from conviction. Alaska Stat. § 12.63.010 (d)(1). Such offenders include 18-year-olds convicted of consensual sexual contact with a 15-year-old, Alaska Stat. § 11.41.438 (a)(1), or of possession of pornography that they know depicts a 17-year-old. Alaska Stat. § 11.61.127 (a). Sex offenders must immediately report a change in address. Alaska Stat. § 12.63.010 (a). Noncompliance is punishable as a felony. Alaska Stat. §11.56.835.

The Act authorizes any means of public dissemination of a registrant's degraded legal status, along with his or her photograph, exact home and work address and other identifying information. Alaska Stat. § 18.65.087.[5] The Alaska Department of Public Safety maintains a central registry of registration information, which Alaska publishes on the worldwide web. Offenders are displayed by "name, color photograph, physical description, street address, employer address and conviction information, all under the banner 'Registered Sex Offender.'" *Doe v. Otte*, 259 F.3d 979, 984 (9th Cir. 2001).

The legislature has significantly amended the criminal law to integrate ASORA fully with Alaska criminal practice. The registration provisions are part of the "Code of Criminal Procedure." Alaska Stat. §§ 12.63.100, 12.63.010. Criminal

[4] Sex offenders must provide, "at a minimum," information regarding name, address, place of employment, date of birth, all sex or child kidnapping convictions, aliases, driver's license number, VIN for all motor vehicles to which the offender has access, any personal identifying features, anticipated changes of address and treatment for mental abnormality or personality disorder. Alaska Stat. § 12.63.010 (b) (1).

[5] The DC-SORA explicitly authorizes any manner of "active notification," which may include a policeman going door-to-door, warning registrants' neighbors. D.C. Code § 22-4011(b)(1)(A). ASORA similarly permits such practices.

Rule 11 requires the duty to register to be a written part of any plea agreement involving a sex offense. Criminal Rule 32(b) requires it to be a written part of the criminal judgment. The provisions of the Act apply *only* to persons otherwise subject to criminal sentences for sex crimes, i.e., those found guilty of sex crimes, who plead guilty or *nolo contendere*, or who are found guilty but mentally ill. They do not apply to those incompetent to stand trial or not criminally responsible by reason of insanity. Alaska Stat. § 12.63.100 (3).

Federal law: The Wetterling Act, 42 U.S.C. § 14071, conditions states' receipt of full federal funding under 42 U.S.C. § 3756 upon creation of conforming sex offender registration programs. § 4071(g)(2). Nonconforming states lose 10% of such funds. § 14071(f)(2). To conform, states must register persons convicted of "a criminal offense against a victim who is a minor" or "a sexually violent offense." § 14071(a)(1)(A). The Act requires no categorical public dissemination at all—only public dissemination of "relevant information" "necessary to protect the public concerning a specific person." § 14071(e).[6] The Act itself contains no retroactivity provision. The Attorney General's guidelines

[6] The United States incorrectly asserts that the Campus Sex Crimes Prevention Act requires States to categorically disseminate information regarding registrants affiliated with institutions of higher education. *See* U.S. Br. at 2, 6, 23. 42 U.S.C. § 14071(j) requires people otherwise obligated to register under state law to provide information about whether they attend or work at a higher education institution and states to enter such data in their existing systems and make it available to the law enforcement agency with jurisdiction over the institution. 20 U.S.C. § 1092 (f)(1)(I), part of a law regulating what information higher education institutions must publish, requires participating higher education institutions to publish a statement of where existing sex registrant information may be obtained. It is not addressed to the states and does *not* require them to alter their public dissemination schemes. The public "release of information" section of the Wetterling Act, 42 U.S.C. § 14071(e), has not been amended.

suggest limited retroactivity for convictions post-dating enactment of a statute, even if the offense occurred previously. 64 Fed. Reg. 572, 575, 581 (1999).

SUMMARY OF ARGUMENT

In response to the problem of sex crimes, and in part because of a belief that sex offenders' sentences are too lenient and many crimes go unreported, Alaska has initiated a pervasive and humiliating regime for unconditionally discharged former offenders that (1) restricts their liberty by permanently degrading their legal status and subjecting them to a lifetime of invasive government monitoring; (2) exposes them to infamy by labeling them "registered sex offenders" and broadcasting their faces and personal information on an Internet "registry" designed to warn the public of their presence in society until the day they die; and (3) imposes these disabilities based solely on a past conviction and not on an assessment of current dangerousness. Not coincidentally, these three characteristics—restrictions on liberty, stigma, and the attachment of those sanctions to a judgment of conviction—have been recognized time and again by this Court as the hallmarks of criminal punishment, *see, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000); *Breed v. Jones*, 421 U.S. 519, 529 (1975); *Mullaney v. Wilbur*, 421 U.S. 684, 697, 700 (1975); and our Constitution's explicit measure of the severity of punishment is the extent to which it makes a person "infamous." U.S. Const. amend. V. Regardless of its label (which we will demonstrate is itself penal), ASORA inflicts punishment under this Court's functional and historical analyses, *see, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). Therefore, it may not be applied to offenses committed before its enactment.

The State's rejoinder to the vexing reality that things are generally what they appear to be is two-fold: The legislature has said otherwise; and the Act's purpose is preventive, to protect the community from future crime, a permissible goal

of civil regulation. Those answers are insufficient to sustain the sanction as a civil regulatory scheme in the face of overwhelming indicators of a forbidden retroactive punishment. First, this Court has always looked past legislative labels and analyzed a law *de novo* to determine whether it is civil or criminal. The State mistakes the "clearest proof" test for an insuperable obstacle to common sense. In reality, the only cases in which "clearest proof" has carried the day for the government have been those, totally unlike this one, when the legislature enacted a law that fit within a legal and historical tradition of civil legislation, and the claim was that an *apparently* civil law was in actuality punitive. *See Hudson v. United States*, 522 U.S. 93, 113-14 (1997) (Souter, J., concurring). But the registration, monitoring and social stigmatization of otherwise free American citizens based solely on a past conviction does not resemble any civil regulatory scheme in our history. To the contrary, such sanctions closely resemble colonial shaming punishments and modern-day supervised release. In cases where the sanction lacked a civil pedigree and instead had the suspicious earmarks of punishment, the Court has not even used the phrase "clearest proof." *See, e.g., Lynce v. Mathis*, 519 U.S. 433 (1997); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994). Whether the Court uses that phrase in this case is unimportant. The fundamental point is that simply through the expedient of labels, the legislature cannot change our historical, societal, and ultimately constitutional understandings of what is, or is not, punishment.

Protection of the community is a goal common both to the civil schemes approved in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *United States v. Salerno*, 481 U.S. 739 (1987), and penal laws prohibiting sex crimes. Standing alone, the articulation of such a goal, however genuine, does not determine which crime-preventive laws are civil and which are punitive. *See United States v. Brown*, 381 U.S. 437, 458 (1965) ("One of the reasons society imprisons those

convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment"); 4 W. Blackstone, Commentaries*11-12 (one objective of criminal law is to "depriv[e] the party injuring of the power to do future mischief"). The schemes in *Salerno* and *Hendricks* passed constitutional muster only because they reserved their sanctions for demonstrably dangerous individuals pending trial on a serious matter or the demonstrably mentally ill and uncontrollably dangerous, bringing them within a historical tradition of permissible civil confinement and demonstrating that the legislature was focused on future dangerousness, rather than retribution. Because the Court's jurisprudence authorizing invasive civil regulation of the person for public safety is founded, at a minimum, on the provision of individualized, accurate and fair determinations of future dangerousness, Alaska's glaring omission of such safeguards can be explained only as punitive.

ARGUMENT

ASORA IMPERMISSIBLY INFLICTS RETROACTIVE PUNISHMENT

A. The *ex post facto* inquiry turns on objective factors, not subjective legislative motives

The Ex Post Facto Clause prohibits the states from enacting a law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798). The purpose of the Ex Post Facto Clause is to give fair notice of what conduct the government will punish as a crime and the extent of the punishment it will inflict, and to "restrai[n] arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810); *Landgraf v. USI Films Products*, 511 U.S. 244, 266 (1994) (a legislature's "responsivity to political pressures" tempts it to target unpopular

groups for retribution). Like the Bill of Attainder Clause, the Ex Post Facto Clause also checks legislatures from invading judicial functions. *Carmell v. Texas*, 529 U.S. 513, 536 (2000).

Contrary to petitioner's suggestion that the Court limit its review to the question whether the Alaska legislature had a genuine motive to protect the public, Pet. Br. at 16, 21-22, this Court's review under the Ex Post Facto Clause is not limited to the near-impossible task of uncovering legislative "shams" and "charades." *See* Pet. Br. at 15, 22. Instead, the Court looks more broadly for "'the lack of fair notice and governmental restraint when the legislature increases the punishment beyond what was prescribed when the crime was consummated.'" *Lynce*, 519 U.S. at 441 (*quoting Weaver*, 450 U.S. at 30); *Cummings v. Missouri*, 71 U.S. 277, 323 (1866) (Clause protects individuals when lawmakers "forget their duties" and "trample upon the rights and liberties of others"). The Constitution protects against all retroactive legislative punishments, not just maliciously inflicted ones. Moreover, this Court has cautioned against the practical and institutional futility of judicial attempts to inquire into legislative motives, *Flemming v. Nestor*, 363 U.S. 603, 617 (1960), and, in any event, "[i]t is well settled that realities rather than benign motives or non-criminal labels determine the relevance of constitutional policies." *In re Winship*, 397 U.S. 358, 365-66 (1970).[7] Consequently, petitioner is inaccurate in claiming that in the numerous cases where this Court has had to "re-label" putatively civil sanctions or proceedings as criminal it has done so by questioning the good

[7] Petitioner's related assertion, that *any* "sanction can be either civil or penal, depending on the legislature's intent," Pet. Br. at 16, is baseless. While true for some sanctions, e.g., monetary fines imposed in certain conditions, "[s]ome governmental exactions are so punitive they may be imposed only in a criminal proceeding." *Kurth Ranch*, 511 U.S. at 793 (O'Connor, J., dissenting).

faith of the legislature. *See* Pet. Br. at 16. The Court reclassified those laws because, functionally, they imposed criminal penalties, regardless of subjective legislative intent.[8]

Megan's laws, retroactively targeting a politically impotent group, implicate the core concerns of the Ex Post Facto Clause because such laws can become oppressive legislative "corrections" of sentences or plea bargains perceived to be too lenient. "Civil regulation" cannot be abused to indemnify the public against the consequences of "an improvident plea bargain on the criminal side." *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring). Yet the United States relies heavily on this forbidden rationale to justify ASORA's draconian approach. U.S. Br. at 20 (categorical approach used because plea bargains understate the severity of the crime); *see also* Council of the District of Columbia, Committee on the Judiciary, Report on Bill 13-350, The Sex Offender Registration Act of 1999, at 6 (same). Legislative suspicion that the conviction—achieved through constitutionally prescribed judicial processes—insufficiently assures the degree of restriction on liberty desired by the legislature becomes the basis improperly to achieve a greater restriction through "civil regulation." This is a legislative usurpation of judicial and executive power and a subversion of the presumption of innocence, *see Carmell*, 529 U.S. at 532: A lesser conviction,

[8] *See, e.g., Lynce*, 519 U.S. at 442 (eschewing arguments that "place undue emphasis on the legislature's subjective intent"; invalidating statute retroactively canceling early release prison credits although legislative intent centered solely around remedial purpose of administering prison overcrowding); *Kurth Ranch*, 511 U.S. 767 (re-labeling grossly excessive tax levied solely on criminal activity as punitive notwithstanding expressed revenue-generating purpose); *In re Gault*, 387 U.S. 1, 50 (1967) (refusing to "disregard substance" and defer to "the 'civil' label-of-convenience . . . attached to juvenile proceedings"); *Breed*, 421 U.S. at 528-29 ("a gap between the originally benign conception of the [juvenile] system and its realities" warrants application of the Double Jeopardy Clause).

obtained because the evidence warranted no greater conviction, is "civilly" augmented by the legislature outside the constraints of the Bill of Rights.

It is not disputed that ASORA imposes a retroactive sanction. The question is whether that sanction is "punitive" in the constitutional sense. To determine whether a statute imposes punishment, the Court first construes the statute. *Mendoza-Martinez*, 372 U.S. at 168; *United States v. Ursery*, 518 U.S. 267, 288 (1996). If the legislature intended the sanction to be punitive, then it is. But the opposite is not true. The Constitution requires that a putatively civil act be treated as criminal if its objective purpose or effect is punitive under the functional and historical criteria traditionally used by this Court, namely: whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only after a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *Mendoza-Martinez*, 372 U.S. at 168. These factors are not exclusive or mechanistically applied, but usefully identify characteristics historically and legally signifying punishment. *See Hudson*, 522 U.S. at 115 (Breyer, J., concurring).

Where a "'civil' label-of-convenience," *Breed*, 421 U.S. at 529, has masked a penal law, the Court has discarded it.[9]

[9] *See, e.g., Cummings*, 71 U.S. 277; *In re Garland*, 71 U.S. (4 Wall.) 333 (1867); *Lipke v. Lederer*, 259 U.S. 557 (1922); *United States v. La Franca*, 282 U.S. 568 (1931); *United States v. Constantine*, 296 U.S. 287 (1935); *United States v. Lovett*, 328 U.S. 303 (1946); *Weaver*, 450 U.S. 24; *United States v. Halper*, 490 U.S. 435 (1989); *Kurth Ranch*, 511 U.S. 767; *Lynce*, 519 U.S. 433.

"The Constitution deals in substance, not shadows.. . . If [the *ex post facto*] inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." *Cummings*, 71 U.S. at 325; *Weaver*, 450 U.S. at 31 ("effect, not . . . form" determines whether a law is punitive).[10] However, when the legislature affixes a civil label to a statute that fits within a well-established tradition of civil legislation, the opponent of the law must point to the "clearest proof" that the apparently civil law is really punitive.[11] That test, which, in any event, is amply satisfied here, can hardly apply to Megan's laws, a totally novel species of legislation. *See Hudson*, 522 U.S. at 113 (Souter, J., concurring) ("[W]hat may be clear enough to be 'clearest' is necessarily dependent on context. . . . I read the requisite "clearest proof" of criminal character, then, to be a function of the countervailing indications of civil nature."); *id.* at 115 (Breyer, J., concurring) ("clearest proof" phraseology "misleading[ly]" describes the Court's reviewing function).

[10] *See also Kurth Ranch*, 511 U.S. at 793 (O'Connor, J., dissenting) ("[T]he Constitution constrains the State's ability to denominate proceedings as civil and so dispense with the criminal procedure protections provided by the Bill of Rights."); *Lynce*, 519 U.S. at 442; *Collins v. Youngblood*, 497 U.S. 37, 46 (1990).

[11] *See Hendricks*, 521 U.S. at 361 ("civil commitment procedure" fell well within the tradition of confining the mentally ill and dangerous for treatment); *Ursery*, 518 U.S. at 274 (*in rem* civil forfeiture within civil tradition dating to "the earliest years of this Nation"); *Fleming*, 363 U.S. at 617 (claim that civil label was pre-textual must fail where there were no objective manifestations of punitive intent and legislature has traditional prerogative to terminate benefits for any rational reason).

B. ASORA is penal in form as well as function because it is an integral part of the criminal process

The Court need not reach the "purpose or effect" inquiry because, as a basic matter of "statutory construction," *see Hendricks*, 521 U.S. at 361, the Act is penal.[12] The legislature did not label the registration requirement civil. Registration is codified in the criminal code, made a mandatory part of the plea and sentence, imposed by criminal court judges, at the behest of prosecutors, and enforced by the police.[13] These familiar penal characteristics are reinforced by the fact that the registration and notification sanctions apply *only* to those convicted of a crime, do *not* apply to those found incompetent or not criminally responsible, and may not be avoided for any reason. While petitioner argues that ASORA's preamble, asserting that the Act's purpose is to "protect the public," is a litmus test of its civil character, in actuality, the preamble closely tracks the Alaska Constitution's requirement that

[12] Constrained by its previous decision in *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), on rehearing, the Court of Appeals held that the expressed legislative intent of the ASORA was non-punitive. *Otte*, 259 F.3d at 986. This Court is not similarly constrained and should reach the opposite conclusion. The Alaska Supreme Court has not construed the statute, and, in any event, this Court determines *de novo* the question of legislative intent in *ex post facto* analysis. *See Hendricks*, 521 U.S. at 365.

[13] *Compare Hendricks*, 521 U.S. at 461 (label of "civil commitment procedure" and placement of statute in probate code evidenced intent to create a civil proceeding); *Hudson*, 522 U.S. at 94, 103 (penalties designated "civil"; "we think it significant that the authority to issue debarment orders is conferred upon 'appropriate Federal banking agenc[ies]'" which are "administrative agencies"); *Allen v. Illinois*, 478 U.S. 364, 368 (1986) (act states proceedings "shall be civil in nature"); *Ursery*, 518 U.S. at 289 (creation of "distinctly civil procedures" for *in rem* action labeled "civil forfeiture" consistent with civil pedigree of such proceedings); *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938) (administrative proceedings in which tax is assessed evidenced civil character).

"[p]enal administration shall be based. . . upon the need for protecting the public." Alaska Const. Art. 1, § 12. By contrast, offender-based laws are more readily classified as civil because they contain provisions guaranteeing extra-penal administrative and judicial proceedings to fairly determine current dangerousness. *See, e.g., Verniero*, 119 F.3d at 1111 (requiring proof of dangerousness by clear and convincing evidence). ASORA's objective features are powerful indicators of punitive legislative intent and are independently important in the functional analysis because they will lead ordinary people to understand the sanction as a punishment.

C. ASORA imposes disabilities and restraints historically regarded as punishment

The historical pedigree of a particular type of sanction has been of crucial importance in the Court's *ex post facto* jurisprudence.[14] "[A] page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 265 U.S. 345, 349 (1921), here, as elsewhere, because history both reveals how the Framers would have viewed the sanction at the time the Clause was adopted and best indicates how society will continue to view it through the lens of our traditions and understandings as a democratic society. Historically and today, ASORA's regime of official monitoring and stigma based solely on a judgment of conviction is the paradigm of punishment.

"The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact," and punishment is characterized by both "outrage on the feelings

[14] *See, e.g., Hendricks*, 521 U.S. at 371 (law "within th[e] pattern and tradition of civil confinement") (Kennedy, J., concurring); *Helvering*, 303 U.S. at 398 (forfeiture and fines deemed civil "since the original revenue law of 1789"); *Ursery*, 518 U.S. at 274 (*in rem* forfeitures deemed civil "[s]ince the earliest years of this Nation").

as well as restraints on the person." *Cummings*, 71 U.S. at 320. Thus, Alaska's narrow view of "disability or restraint," equating that term with incarceration, Pet. Br. at 37-38, is inaccurate and has been expressly rejected by this Court. *Cummings*, 71 U.S. at 322 (rejecting government argument that punishment is limited to "the deprivation of life, liberty, or property"). Incarceration is obviously not the touchstone of punishment, as probation is punishment, *Korematsu v. United States*, 319 U.S. 432, 435 (1943), while imprisonment may be regulatory. *Salerno*, 481 U.S. 739. To the Framers, the public humiliation inflicted by ASORA would have seemed a much more familiar form of punishment than incarceration, whose prevalence has exponentially increased only in modern times. *See* Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 Mich. L. Rev. 1179, 1180 (1981-82).

1. Registration is an affirmative restriction on liberty analogous to other forms of punishment, like probation or parole.[15] To remain at liberty, registrants must perpetually submit to official monitoring by providing a wide range of personal information in sworn statements, including current home and work address, a description of personal identifying features, motor vehicle information and a statement regarding mental health treatment. They must submit to periodic fingerprinting and photographing. Registrants may not shave their beards, color their hair, borrow a car, or visit a psychiatrist without reporting such personal matters to the government. Life registrants must re-register *at least* quarterly; others must do so annually. The Act gives authorities

[15] While a parolee is required to submit to conditions besides reporting, he also receives a benefit from being on parole, shortening his prison sentence and getting help reintegrating into society. *See Morrisey v. Brewer*, 408 U.S. 471, 477 (1972). Registrants are more burdened than parolees because registration does not shorten their prison sentence, and notification is intended to exclude them from, not reintegrate them into, the community.

discretion to force registrants to report in-person, by mail, or even by having a police officer arrive unannounced at their place of business. This awesome governmental power is bestowed through the statutory command that registrants submit their sworn statements "in the manner required by the department."[16]

The requirement of submission to government surveillance deviates sharply from our civil liberty norm, a hallmark of which is that Americans do not have to "produce papers" or submit to suspicionless scrutiny at the whim of state officials. *Gomez v. Turner*, 672 F.2d 134, 143-44 n. 18 (D.C. Cir.1982) ("That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others"); *Brown v. Texas*, 443 U.S. 47 (1979) (police cannot require person to identify himself absent reasonable suspicion); *Terry v. Ohio*,

[16] Alaska faults the court below for relying on its attorney's representation at oral argument that the Act requires in-person quarterly re-registration, when, in fact, the Act does not have that specific requirement, but instead gives the government unfettered discretion to require *any form* of re-registration, *at least*, quarterly. Thus, while the State may choose a less onerous registration method than outlined in the Ninth Circuit opinion, it may also choose a *more* onerous method. Since an *ex post facto* challenge must be addressed to a statute on its face, not as applied, *Seling v. Young*, 531 U.S. 250, 262 (2001) (analysis "cannot be altered based merely on the vagaries in the implementation of the authorizing statute"), existing practice, which may change at a moment's notice, is immaterial. The D.C. statute is similar, permitting on demand verification, photographing, fingerprinting, or "meet[ing] with responsible officers and officials." D.C. Code §§ 22-4007—4009, 4014. In mid-litigation, the District's Offender Supervision Agency changed its policy from requiring in-person verification to permitting mail verification. *See also Doe v. Pataki*, 120 F.3d at 1285 ("we recognize that the duty to register in person every 90 days for a minimum of ten years is onerous"). Moreover, even if the Act were limited to sworn statement submitted by mail, it would still impose an invasive legal duty that does not otherwise exist.

392 U.S. 1, 34 (1968) (White, J. concurring) (refusal to cooperate with suspicionless inquiry can furnish no basis for arrest); *Weems v. United States*, 217 U.S. 349, 366 (1910) (punishment of government surveillance is a "perpetual limitation [on] liberty").

As former Massachusetts Justice Fried put it:

> [T]o keep the concept of regulation in its place, it may be said that, while activities, professions, or relationships may be regulated, we do not have a general regime regulating adult competent persons as such . . . . Persons are left to choose freely and if they make the wrong choices they are subject to retrospective condemnation and punishment. This is not merely a conceptual difference. It is a profound expression of our Constitution's conception of human nature and of the relation of individuals to the State.
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> * * *
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> To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government.

Doe v. Attorney General, 686 N.E.2d at 1015-16 (concurring opinion).[17]

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[17] This Court has never upheld a "felon registration" law as a proper civil regulation, as that question was not presented in *Lambert v. California*, 355 U.S. 225 (1957). Although some existed in the early part of the twentieth century, such laws were widely criticized. *See generally* Note, *Knowledge of the Law Required for Conviction Under Criminal Registration Ordinance*, 56 U. Mich. L. Rev. 1008, 1011 (1958) (enforcement marked by "[a]busive and discriminatory practices"); Note, *Criminal Registration Ordinances: Police Control over Potential Recidivists*, 103 U. Pa. L. Rev. 60, 82-94 (1954) (laws used as a pretext for "rounding up the usual suspects"). Many have been repealed. *See, e.g.*, 18 U.S.C. § 1407 (repealed 1970) (requiring drug addicts to register when crossing border); N.J. Stat. Ann. § 2A:169A-2 (repealed 1971) (felon Registration). Those laws still in existence are nothing like ASORA. They require one-time registration only, sometimes imposing a further reporting duty only in the event of a change in address, contain provisions prohibiting public disclosure and frequently exempt felons whose civil rights have been restored. *See, e.g.*, Ala. Code § 13A-11-181—185; Fla. Stat. Ch. 775.13; Miss. Code Ann. § 97-35-27; Nev. Rev. Stat. 179C.100-170. Thus, while imposing a modest restriction on liberty, they do not expose registrants to infamy.

Submission to official personal monitoring is fundamentally unlike the registration of businesses, political candidates, and other participants in regulated activities. *See* Pet. Br. at 40 n.26. Such registration is not a sanction at all, but a reasonable condition attaching to voluntary participation in regulated activities. Moreover, applying for a license for a business or profession is not stigmatizing. Similarly, sex offender registration cannot be compared with filing taxes or a census form, civic duties, grounded in the Constitution, that apply to the entire citizenry. *See Dep't of Pub. Safety*, 271 F.3d at 59.

2. Registration and public notification officially stigmatize registrants in a manner historically regarded as punishment in two significant ways. First, "registered sex offender" status and publication of the sex offender registry officially enlarge the stigma attached to the conviction. Since stigma stemming from criminal conviction is a hallmark of punishment, enlargement of the stigma signifies an enlargement of the punishment. *See In re Medley*, 134 U.S. 160, 170-71 (1890). Second, forcing offenders to wear the name of their crime—the very function of public notification—is a State infliction of public disgrace that has historically been punishment and only punishment.

The sex offender registry fundamentally differs from the publicly available judicial record of conviction. Open criminal records and trials reflect our common law tradition and the constitutional mandate of public access to criminal

proceedings and protect the accused's as well as the public's rights. The sex offender registry is not designed to facilitate access to judicial records of historical events adjudicated in criminal cases. If it were, there would be no need for a rigorous regime of personal registration. Instead, dissemination of the registry communicates the State's perpetual, not past, judgment of condemnation and registrants' current, not historical, information.

The public is told that the former offender is a "registered sex offender," i.e., a state-certified menace.[18] This is not dissemination of a public record. "This is a determination of status." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 175 (1951) (Douglas, J., concurring) (Attorney General's classification of organizations as communist or subversive is a stigmatizing alteration of legal status); *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 204 (D.C. Cir. 2001) (Attorney General's designation of "terrorist" organizations alters legal status); *Doe v. Attorney General*, 686 N.E.2d at 1013 ("[S]tatutory branding . . . implicitly announces that, in the eyes of the State, the plaintiff presents a risk of committing a sex offense.").

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[18] Lower courts have overwhelmingly held that publication of the registry is stigmatizing because it communicates the State's current assessment of a likelihood of continuing criminality, not merely a past record. *See, e.g., Doe v. Dep't of Pub. Safety*, 271 F.3d at 49; *Fullmer v. Michigan Dep't of St. Police*, 2002 WL 1164148 (E.D. Mich.); *Williams*, 167 F.Supp. 2d at 51; *Doe v. Lee*, 132 F. Supp. 2d 57, 64 (D. Conn. 2001); *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999); *Doe v. Pataki*, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998); *Roe v. Farwell*, 999 F. Supp. at 195-96; *W.P. v. Poritz*, 931 F.Supp. 1199, 1219 ((D.N.J. 1996); *Bani*, 36 P.3d at 1264; *Commonwealth v. Williams*, 733 A.2d 593, 605-06 (Pa. 1999); *Doe v. Attorney General*, 715 N.E. 2d 37, 43 (Mass. 1999); *Doe v. Poritz*, 662 A.2d 367, 419-20 (N.J. 1995); *People v. David W.*, 733 N.E.2d 206, 210-11 (N.Y. 2000); *Noble v. Board of Parole*, 964 P.2d 990, 995-96 (Ore. 1998). *Cf. Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997); *Valmonte v. Bane*, 18 F.3d 992, 1000 (2d Cir. 1994).

The State intensifies its assault on reputation and dignity by broadcasting its condemnatory labeling of registrants together with information that pinpoints registrants' identity and location at all times. This unprecedented governmental packaging and publication of stigmatizing legal status and personal information devastates registrants' reputation, privacy and personal security. Exposure of former offenders to constant public scrutiny, harassment and potential violence denudes registrants of a basic human dignity, "the right to be let alone," which Justice Brandeis characterized as the "right most valued by civilized men.'" *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). While such treatment of citizens raises a serious question of invasion of privacy under the Due Process Clause,[19] the salient point here is that placing free American citizens in a government-constructed fishbowl is offensive to American sensibilities, and therefore has no regulatory pedigree, but *is* consistent with the dangers, indignity and diminution of privacy associated with prison life or life on conditional release. *Cf. United States v. Knights*, 534 U.S. 112 (2001) (probationer has diminished expectation of privacy).

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[19] *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (Clause protects "the individual interest in avoiding disclosure of personal matters"); *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999); *A.A. v. New Jersey*, 176 F. Supp. 2d at 300 (enjoining State, on federal constitutional privacy grounds, from placing registrants' home addresses on the Internet for indiscriminate public access); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998) (police officers had constitutional privacy interest in the nondisclosure of their home addresses as chance of retaliation and physical violence by private citizens was substantial). "Most courts considering the question . . . agree that privacy of personal matters is a protected interest." *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (collecting cases); *Cf. United States Dep't of Defense v. FLRA*, 510 U.S. 487, 501 (1994) (FOIA does not permit disclosure of home addresses; "it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant").

Aggressive public notification of the offender's crime has historically been used as punishment. England and Colonial America often dealt with crime through a variety of "humiliatory punishments," *Hirsch*, *supra*, at 1225, such as the scarlet letters of literary fame. These historical antecedents are critical because they were intimately familiar to the Framers, whose very conception of the severity of punishment was whether it exposed the offender to "infam[y]." U.S. Const. amend. V. While in modern times, imprisonment in the penitentiary has replaced capital punishment for most formerly capital crimes and entirely replaced infamous corporal punishments, and has therefore become the typical measure of infamy for constitutional purposes, *see Mackin v. United States*, 117 U.S. 348, 351 (1886); *United States v. Moreland*, 258 U.S. 433, 448 (1922) (Brandeis, J., dissenting), the Alaska legislature's return to the Constitution's original conception of infamous punishment through a public notification scheme that results in "public disgrace" and "exposure to infamy," "render[ing the offender's] loss of reputation permanent," *id.*, cannot escape its punitive roots.

Plastering registrants' faces on the Internet under the label "registered sex offender" (in the District of Columbia, the label is imposed on the offender's chest, *see* http://www.mpdc.dc.gov/serv/sor/sor.shtm) is functionally indistinguishable from forcing them to wear a scarlet letter, an infamous colonial punishment etched in our national conscience by Hawthorne's famous novel. "This custom of labeling a criminal with words or initials expositive of his crime or his political or religious offense, is neither American nor Puritan in invention and operation, but is so ancient that the knowledge of its beginning is lost." Alice M. Earle, *Curious Punishments of Bygone Days* 94 (1896) (Applewood reprint 1995). *See also* Raphael Semmes, *Crime and Punishment in Early Maryland* 32 (1938) (offenders stood in the pillory wearing signs listing their crimes); Edwin Powers, *Crime and Punishment in Early Massachusetts* 198-201 (1966)

(describing signs and symbols signifying criminality); *Barenblatt v. United States*, 360 U.S. 109, 153 (1959) (Black, J., dissenting) ("punishment by humiliation and public shame" is "one of the oldest forms of governmental punishment known to mankind; branding, the pillory, ostracism and subjection to public hatred being but a few examples of it"); *Ex Parte Wilson*, 114 U.S. 417, 427 (1885).

While many colonial humiliatory punishments involved infliction of physical pain, many did not. Their essence was public disgrace: "[T]he authorities often dispensed with the punishment's physical component entirely: Many humiliated offenders were required simply to stand in public with signs cataloguing their offenses, a punishment that relied solely on mental anguish for its rehabilitative and deterrent effect." Hirsch, *supra*, at 1226. For less serious crime, labeling punishments were temporary, permitting eventual reintegration. More serious offenders would be labeled permanently so as to suffer "permanent stigmas, which in effect cast the person out of the community, though they did not involve physical banishment." Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1913 (1991). Just like ASORA's avowed purpose, an important purpose of labeling punishments, especially when long-lasting or permanent, was to warn the community of the offender's presence for the sake of community protection. "Branding and letter-wearing were ways of marking an offender publicly—like sitting in the stocks, but far more permanently. The message was that *this* offender was not likely to mend his ways; disgrace would and should last until death." Lawrence M. Friedman, *Crime and Punishment in American History* 40 (1993); Hirsch, *supra*, at 1228 (branding and mutilation fixed "an indelible 'mark of infamy'"—"their specific motive was to disable the offender from ever harming the community again").

Nor is our experience of ostracizing punishments limited to remote epochs. Judges are spearheading a virtual renaissance

of disgracing punishments, frankly labeled as such. *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean*?, 63 U. Chi. L. Rev. 591, 631-35 (1996) (citing newspaper accounts of judges ordering probationers to post signs, declaring, for example, "I am a convicted child molester," or shirts saying "I am on felony probation for theft" or "I am a thief"); Massaro, *supra*, at 1884-90; Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 Duke L.J. 1357. Judges impose such sanctions as punishments because they consider them punishments, the community perceives them as punishments and because they serve the goals of punishment—retribution, deterrence and incapacitation through public warning and shunning. *See State v. Bateman*, 771 P.2d 314 (Ore. App. 1989) (probationer required to post signs that read "Dangerous Sex Offender—No Children Allowed"); *State v. Burdin*, 924 S.W.2d 82 (Tenn. 1996) (sex offender sign in front yard "warning all children"); *People v. Hackler*, 16 Cal. Rptr. 2d 681, 686 (1993) (judge told defendant he would "become a Hester Prin [sic] for one year") *Goldschmitt v. State*, 490 So.2d 123, 125 (Fla. Dist. Ct. App. 1986) (forcing probationer to display bumper sticker announcing D.U.I. conviction appropriately "inflicts disgrace and contumely in a dramatic and spectacular manner").

Professor Kahan predicts that the emerging humiliatory punishments—such as "stigmatizing publicity" (official publication of names of offenders and their crimes in newspapers and billboards) and "literal stigmatizing" (inviting ridicule by forcing offenders to wear symbols expositive of their crimes)—are likely to succeed politically because the public will perceive them as richly expressive of condemnation, where other incarceration alternatives, such as fines and community service, have failed because they convey condemnation only ambivalently. Kahan, *supra*, at 631-35, 649-53. These punishments "magnify the humiliation inherent in conviction by communicating the offender's status to a

wider audience." *Id.* at 631-32. ASORA's sanction combines the humiliating features of magnifying stigma through wide publication and evoking ridicule through labeling offenders' images with their crimes and signifies more condemnation than these recognized punishments because the status it conveys is not just that of convict, but of "registered sex offender," a convict singled out for perpetual governmental monitoring, which, because of the value of liberty and privacy in our society, is itself degrading to endure and to have others know about.

Alaska's disavowal of the lineage of its public notification scheme is unpersuasive. *See* Pet. Br. at 35-36. As demonstrated, the essence of disgracing punishments was not physical pain, but exposure to infamy and loss of reputation, otherwise offenders would have been punished privately and purely disgracing punishments, like letter-wearing, would not have been inflicted. *See* Kahan, *supra*, at 611 ("For early Americans, shame was an even more salient ingredient of corporal punishment than was physical pain."). Indeed, the decline of corporal punishment is traced to its inefficacy as a shaming device as communities grew larger, diluting the strength of public disgrace—a problem now solved by superior means of communication, like the Internet. *Id.* at 642. The State's claim that public notification does not involve the former offender's "physical participation," is difficult to grasp. Pet. Br. at 36. Registrants are required to "physically" present themselves to provide the information and sit for the photographs used to degrade them. More importantly, the cyber-"confrontation," *id.*, of the humiliated registrant and his community is the most effective way to deliver shaming and ostracism today, *see Reno v. ACLU*, 521 U.S. 844, 870 (1997) (the Internet projects "a voice that resonates farther than it could from any soapbox") and has indisputably led to vigilantism and harassment. *See Amicus* Br. of N.J. Public Defender. Wanted posters and warnings about escaped prisoners are hardly the better analogy, Pet. Br.

at 36, since registrants are not in need of capturing. The warning the government disseminates by publishing the registry is that former offenders are to be ostracized *because of their criminal conviction alone*, precisely the purpose of colonial shaming punishments, which marked the offender with his crime so as to "disable the offender from ever harming the community again." *Hirsch*, *supra*, at 1226; *see also Verniero*, 119 F.3d at 1114-19 (Becker, J., dissenting).

Our historical understanding of punishment as a stigmatizing restriction on liberty imposed solely as a consequence of criminal conviction is ubiquitously recognized in the Court's decisions requiring that various findings be subjected to the rigors of the Bill of Rights when they subject one to increased punishment. *See Apprendi*, 530 U.S. at 484 (facts that increase "the loss of liberty and the stigma attaching to the offense" must be tried to the jury); *Winship*, 397 U.S. at 363 (reasonable doubt standard required because the accused faces the possibility of loss of liberty and "the certainty that he would be stigmatized by the conviction"); *Breed*, 421 U.S. at 529 (double jeopardy applies in juvenile proceedings because stigma and loss of liberty attach to guilt finding); *Mullaney*, 421 U.S. at 697, 700 (criminal law protects "the defendant's critical interests in liberty and reputation"; equating increase in stigma with increase in punishment).

3. In *Hendricks*, the Court approved, against an *ex post facto* and substantive due process challenge, a civil commitment scheme that inflicted both a severe restraint on liberty and stigma, much like criminal punishment. But the critical feature in *Hendricks* was that the sanction did not attach because of past conviction. The Court repeatedly underscored that the sanction was "limited . . . to a small segment of particularly dangerous individuals" and past crime was "used solely for evidentiary purposes," in a civil commitment trial addressed to *current* dangerousness and mental abnormality. 521 U.S. at 362, 368-71. Those committed had

to be treated, if-treatable, and freed from governmental regulation when not dangerous or not mentally ill. *Id.* at 368-69; *Foucha v. Louisiana*, 504 U.S. 71 (1992). The Court painstakingly reviewed the Kansas statute and approved it only because its strict substantive criteria and procedural protections brought it within a historical and legal tradition of confining the mentally ill and dangerous. *Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring) (protections bring statute "within th[e] pattern and tradition of civil confinement"). In *Kansas v. Crane*, 534 U.S. ___, 122 S. Ct. 867 (2002), the Court further limited sexual psychopath commitment by more tightly tethering it to the traditional *parens patriae* model of civil commitment of the dangerously mentally deranged: The State must prove a link between the alleged mental abnormality and future dangerousness in the form of a substantial inability to control behavior. The Court underscored that any lesser requirement would permit "civil" commitment to displace criminal law. *Id.* at 870.

ASORA is as far flung from the tight regime of *Hendricks-Crane* as it can be. Not only is there no requirement that registrants be mentally abnormal or lack impulse control, they need not be dangerous. They receive no treatment and cannot shorten their registration and notification period by even one day for any reason, including conclusive proof of rehabilitation or total physical incapacitation. Because the Act does not require current findings relative to the purported remedial goal of averting future danger, the sanction is retributive and backward-looking.

Acceptance of the assertion that the legislature could, consistent with a purpose to regulate for future dangerousness, eliminate an inquiry into future dangerousness because such predictions are "unreliable" and "tentative at best," U.S. Br. at 22, "would immediately call into question those other contexts in which predictions of future behavior are constantly made," *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983), such as civil commitment, preventive detention and

imposition of the death penalty. It is untenable that prediction of future dangerousness is reliable enough to support indefinite confinement or a death sentence, but not decisions about public notification of sex offenders who have completed their sentences and paid their debt to society.

The cases where the Court has permitted a civil "tacking on" of a sanction based solely on past criminal conviction are quite distinct from the situation here. A one-time civil monetary sanction may be imposed solely as a consequence of criminal conviction, in addition to criminal penalties for the same conduct. *Hudson*, 522 U.S. at 113-14. Prior convictions may also disqualify ex-felons from certain *activities* to which that conviction is relevant, such as a particular profession or owning a gun. *See, e.g., id.* (debarment from banking profession based on fraud). In both instances, the Court has relied on the long civil pedigree of such sanctions, a factor entirely lacking here. *See Helvering*, 303 U.S. at 399. The Court has also recognized the financially remedial function of civil fines, *id.* at 401, and the legislature's broad authority to regulate professions, licenses and the like. In *Flemming*, the Court explained that "[w]here the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified." 363 U.S. at 613-14.[20]

ASORA does not seek to exclude ex-offenders from a profession, licensed activity or like privilege, to which their conviction may be relevant. It seeks to exclude them from living a normal, dignified, private life, which is the birthright

[20] *Compare Hawker v. New York*, 170 U.S. 189 (1898) (excluding felons from medical profession was regulatory) *with Cummings*, 71 U.S. at 320 (sanction designed "in order to reach the person, not the calling," is punitive).

of every American citizen not civilly or criminally committed to the State. "'There are places in the world where failure is final. America is still the country of second chances.'" Amy Franklin, *Cheney to Speak at Michigan State Commencement*, Assoc. Press, May 3, 2002, at 1 (quoting the Vice President). The State may, of course, deny a "second chance" by imposing severe criminal penalties, but it must do so within the constraints of the Ex Post Facto Clause. Neither the State nor its *amici* offer a principled basis for confining a humiliating regime of registration and notification like ASORA to sex offenses. Offense-based laws like Alaska's and D.C.'s broadly encompass nonviolent crimes and petty offenses not deemed serious enough to warrant a jury trial (the non-jury-demanderable offense of "misdemeanor sexual abuse," D.C. Code § 22-3006, when committed against a person under 18 is subject to ten-year registration and notification). Moreover, as the United States admits and the record of this case proves, many people who commit serious sex crimes respond to treatment and are redeemable. *See* U.S. Br. in *McKune v. Lile*, No. 00-1187 at 3 & n.2, 21, 23. Neither the categorical seriousness of the crime, nor the categorical (and seriously overstated, *see Amicus* Br. of Massachusetts Committee of Public Counsel Services) likelihood of recidivism distinguish ASORA's offenses from the non-sexual offenses now exempted, but which, may, in the future become the target of public anger. Instead of a nation of second chances, America would become a nation of state-sponsored finger-pointing and recrimination long after the offender's debt to society assessed by the legislature, juries and the courts has been retired.

D. ASORA has the traits of a penal law under the remaining functional factors

The remainder of the functional analysis supports the conclusion that ASORA is punitive. As discussed, the State's extreme reliance on the law's preventive purpose is misplaced

because that precise purpose is shared by the criminal law. Alaska Const. Art. 1, § 12; *Hendricks*, 521 U.S. at 381 (Breyer, J., dissenting) ("I would place particular importance upon those features that would likely distinguish between a basically punitive and a basically nonpunitive purpose"); *Foucha*, 504 U.S. at 99 (Kennedy, J., dissenting) ("isolation of the dangerous has always been considered an important function of the criminal law").

More significant is the sanction's gross disproportionality to a preventive purpose. A legislature's failure to use "alternative and less harsh methods" to achieve a purported regulatory objective tends to show that the legislature's "purpose . . . was to punish." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979). Alaska's failure to focus its regime on future dangerousness in any meaningful way is unacceptable in this context. As demonstrated, mere rational relationship between means and ends may be constitutionally acceptable for a narrow sanction, like occupational debarment based on a conviction, but not for a sanction that perpetually exposes one to infamy and restricts liberty. This Court's *ex post facto* jurisprudence has consistently examined proportionality of means and ends and in the arena of invasive regulation of the person for public safety, only a narrowly tailored approach has ever been found to be consistent with our historical and legal models permitting such extraordinary state action. *See Doe v. Attorney General*, 686 N.E.2d at 1014-16 (Fried, J., concurring) (under the *Hendricks* model, Megan's laws are justifiable only when "narrowly tailored to a grave danger"). We therefore agree with the Court of Appeals that ASORA's excessiveness speaks volumes about its punitiveness and has been the decisive factor in most relevant Court of Appeals decisions.[21]

[21] *See Doe v. Pataki*, 120 F.3d at 1277-78 ("[f]irst and foremost, the extent of notification is carefully calibrated to, and depends solely upon, the offender's perceived risk of re-offense"); *Roe v. Office of Adult Probation*, 125 F.3d at 53-54 (notification "depends solely upon the offender's perceived risk of re-offense, and not upon the fact of his prior conviction," based on "individualized clinical assessment by a treatment provider"; notification strictly limited "to persons who may be endangered . . . due to the offender's activities or proximity"); *E.B v. Verniero*, 119 F.3d at 1097-98 (notification "scheme is a measured response . . . that does not subject all registrants to dissemination of information beyond law enforcement"; and individualized "risk assessment" "based on objective criteria" "is utilized to determine the maximum scope of the notification"); *Russell v. Gregoire*, 124 F.3d at 1090-91 ("The law contains careful safeguards to prevent notification in cases where it is not warranted and to avoid dissemination of the information beyond the area where it is likely to have the intended remedial effect. . . . A law designed to punish an offender would not contain these strict limitations on notification"); *Cutshall v. Sundquist*, 193 F.3d at 474 ("the authority of law enforcement agencies to disclose registry information is limited to situations in which disclosure is necessary to protect the public"). *See also Myers*, 923 P.2d at 1041 (excessive Megan's law is punitive); *Doe v. Attorney General*, 680 N.E.2d at 99 (same).

Mandatory application of the sanction solely based on a criminal conviction further supports the conclusion that ASORA simply piles on additional punishment to a pre-existing conviction. *See Kurth Ranch*, 511 U.S. at 781; *Lipke*, 259 U.S. at 561-62; *Hendricks*, 521 U.S. at 362. The scienter inquiry determines whether the conduct to which the sanction attaches is of the sort normally considered a crime because scienter has been an important hallmark of criminal liability. *See Liparota v. United States*, 471 U.S. 419, 426 (1985). In this case, there is no need for a scienter inquiry because ASORA's sanction applies not only to behavior that is a crime, it applies only when that behavior has been reduced to a criminal conviction. *Compare Child Labor Tax Case*, 259 U.S. 20, 37 (1922) (where no existing federal crime prohibited child labor, Court determined that federal tax is in actuality a criminal punishment because it was imposed only upon a finding of scienter). Finally, as demonstrated, ASORA's sanctions serve the traditional aims

of punishment—retribution and deterrence—by imposing a foreboding sanction based solely on the blameworthiness of past criminal conduct, rather than present dangerousness.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

JAMES W. KLEIN
SAMIA A. FAM *
CORINNE A. BECKWITH
ANDREA L. ROTH
PUBLIC DEFENDER SERVICE FOR
THE DISTRICT OF COLUMBIA
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

* Counsel of Record

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